

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Boost Oxygen, LLC,

Plaintiff,

v.

Oxygen Plus, Inc., a Minnesota  
corporation,

Defendant.

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File No. 17-CV-5004

(PJS/SER)

Minneapolis, Minnesota

May 8, 2019

8:30 a.m.

BEFORE THE HONORABLE PATRICK J. SCHILTZ  
UNITED STATES DISTRICT COURT JUDGE  
(MOTION HEARING)

**APPEARANCES**

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**P R O C E E D I N G S**

**IN OPEN COURT**

THE LAW CLERK: All rise. United States District Court for the District of Minnesota is now in session, the Honorable Patrick J. Schiltz presiding.

THE COURT: Good morning. Please be seated.

We are here this morning on the case of Boost Oxygen, LLC v. Oxygen Plus, Incorporated. The case is Civil No. 17-5004.

If I could have the attorneys make their appearances, please, beginning over here (indicating).

MR. NEUNER: Robert Neuner, N-E-U-N-E-R, of Hoffmann & Baron located in New York. May it please the Court.

THE COURT: Good morning.

MS. AGBAJE: Esther Agbaje with Ciresi Conlin as local counsel.

THE COURT: Good morning.

MR. LANDY: And Barry Landy, also with Ciresi Conlin.

THE COURT: And good morning to you.

MR. HANSEN: Good morning, Your Honor. Loren Hansen of the Gray Plant Mooty firm. And with me today are my clients, Christine Warren and Lauren Carlstrom.

THE COURT: Good morning to all of you.

1 Mr. Neuner, is that how you pronounce it?

2 MR. NEUNER: Yes, Your Honor.

3 THE COURT: Mr. Neuner, it's your motion so let me  
4 have you at the podium if I could, please.

5 MR. NEUNER: May it please the Court. I'd also  
6 like to introduce, Your Honor, the president and CEO, and  
7 who happens to be my son, Rob Neuner, right here  
8 (indicating).

9 THE COURT: Okay.

10 MR. NEUNER: Your Honor, this is a case that began  
11 and right now it's ending or near its end as a case of  
12 unfair competition. This Court has entered and the parties  
13 have agreed to a settlement and consent judgment pursuant to  
14 which the validity of the Boost patent, the design patent  
15 covering -- and I apologize for not having the cans with me;  
16 I couldn't get them on the plane -- but, anyway, covering  
17 the mask --

18 THE COURT: The mask, right.

19 MR. NEUNER: -- the canister. The validity has  
20 been acknowledged, the infringement by Oxygen Plus has been  
21 acknowledged, and an injunction has been acknowledged.

22 Now, the parties reached an agreement which was  
23 eminently fair to Oxygen Plus, eminently fair. Under the  
24 settlement and consent judgment, Oxygen Plus was essentially  
25 given 12 months in which to get out of the market for this

1 particular type mask. The first six months were covered by  
2 a payment of 75,000. The next six months were covered by an  
3 increasing scale of payments beginning with 10,000 and  
4 ending with 35,000. Now, the parties anticipated at the  
5 time that they'd be out of the market within the six-month  
6 period, the 75 would cover it. It happened that they were  
7 not. And it happened that they were making and selling in  
8 the period November -- and I might go backward. The period  
9 of the license, if you will, was from May 15th, 2018 to May  
10 15th, 2019.

11 So at the end of the six-month period, after which  
12 the -- and the 75,000 had been paid, Oxygen Plus was still  
13 in the business of selling this particular mask, the mask  
14 that was adjudicated by this Court and agreed to by the  
15 parties to be an infringement of the design patent, to be an  
16 infringement of the trade dress that Boost Oxygen had in  
17 this particular product.

18 And I might add, Your Honor, this is a situation  
19 where the mask is a totally innovative development by Boost  
20 Oxygen. It was unlike anything that had preceded it. The  
21 market for oxygen canisters is rife with masks and discharge  
22 nozzles of any shape and form. I mean, you want to be in  
23 this business, you can put a nozzle on that is not going to  
24 approach anything that looks like the Boost Oxygen patent.  
25 And that didn't happen. All right. So we have the seventh

1 month, if you will, of continuing sales of the mask that was  
2 considered to be an infringement and found to be an  
3 infringement.

4           Thereafter, in January of 2019 at a trade show --  
5 and, Your Honor, that is part of the Neuner declaration  
6 supporting the motion -- where depictions of the infringing  
7 mask were shown at this show. Now, the defendant, Oxygen  
8 Plus, argues that, well, maybe that was -- I'm not even sure  
9 what they argue, but they certainly say that what was  
10 depicted or what was sold and offered for sale at that trade  
11 show was not what they had been making before.

12           Well, here you have a situation -- and it's, as I  
13 say, appended to the Neuner declaration -- here you have a  
14 situation where the exact design of that which was found to  
15 be an infringement is shown in a large forum, the exact  
16 design.

17           THE COURT: Well, I saw the big bottle and the  
18 pictures, but the settlement agreement, the consent judgment  
19 doesn't prevent them from displaying it. It only triggers  
20 royalties if they sell it.

21           MR. NEUNER: That's correct, Your Honor.

22           THE COURT: And I didn't see any proof that they  
23 sold anything at the Denver trade show. Sometimes you sell  
24 things, sometimes you don't.

25           MR. NEUNER: That's exactly right.

1 THE COURT: It's uncontested that during that  
2 seventh month -- whatever that is, November to December --  
3 that they sold the infringing mask and they owe you money.  
4 And their reasons for withholding the check are ridiculous,  
5 and you're owed the \$10,000. So there's no question in my  
6 mind about that. After that, though, I mean, they say that  
7 they redesigned the mask. They've given me the invoices.  
8 They said they've ordered thousands of these redesigned  
9 masks and they're not selling an infringing mask anymore.  
10 You say they are selling an infringing mask. And you had  
11 your sister order some via mail and you say, look, here's  
12 what they say is the new mask. Here's the old mask.  
13 They're the same. I don't know how I can do this on the  
14 fly. I mean, it's basically like trying to get me to do a  
15 patent-infringement case on the fly. I don't think I can do  
16 it.

17 MR. NEUNER: I couldn't agree more, Your Honor.  
18 And that's, obviously, a concern of ours; namely, whether or  
19 not this ought to require, if you will, a separate patent  
20 trial.

21 THE COURT: I have had a lot of patent cases that  
22 get settled through license and the license has somebody  
23 agree that they will no longer sell an infringing product  
24 after a certain date, and then the accusation is made that  
25 they are selling an infringing patent, they essentially have

1 a brand-new patent lawsuit. We may be able to cut corners  
2 in the sense that we have an adjudication of the old mask  
3 violated the patent, the '250 patent. And if you can hold  
4 up the old mask and new mask and in fact they're identical,  
5 that might help us shortcut it, but at this point I don't  
6 know what to do except send you folks off to take discovery.

7 I can't tell at any time whether we're talking  
8 about the old mask that they're selling -- they are allowed  
9 to sell the old mask, the infringing mask, as long as they  
10 pay you a royalty; they are allowed to do so, I guess, until  
11 next week -- or we're talking about the new mask. I just  
12 can't tell from this, other than I can tell they owe you  
13 \$10,000, plus interest, for December. Other than that, I  
14 don't know what I can do today on this record.

15 MR. NEUNER: As well as 30,000 because they  
16 acknowledge that what they sold in the period March 15th to  
17 April 15th was the design, if you will, covered by the  
18 consent judgment. So that's acknowledged.

19 THE COURT: March 15th to April 15th of this year?

20 MR. NEUNER: This year, yes, Your Honor.

21 THE COURT: When did they acknowledge that? I  
22 just missed that, if they did.

23 MR. NEUNER: By giving a report on the number of  
24 cans sold, and that is in the email of counsel.

25 THE COURT: Cans sold with the infringing mask on

1       it?

2               MR. NEUNER: Yes, Your Honor.

3               THE COURT: Okay. I'm sorry, I just missed that.  
4 I did read through the exhibits, but somehow I just missed  
5 that.

6               MR. NEUNER: And I certainly understand your  
7 concern, but -- and it may be that we're going to need some  
8 discovery in this case, but Your Honor can make a decision.  
9 And there's a *TiVo v. Echostar* case which sort of tells you  
10 how to proceed in this kind of a contempt proceeding and  
11 that is take the infringing canister, hold it, take the new  
12 canister -- and whether or not they have sold it, I mean,  
13 that I don't know. But the Warren declaration illustrates  
14 what they say is the new design and, as far as I can see,  
15 there is no difference between the new design and the old  
16 one.

17              THE COURT: I don't know. I don't have the new  
18 mask. I mean, what I would need in front of me is something  
19 that is undisputed to be the new mask. And then I would  
20 need something that's undisputed to be the old mask. And  
21 then I'd look at the two. You say they're going to be  
22 identical. They say they won't be identical.

23              I don't know if you do patent work as part of your  
24 --

25              MR. NEUNER: I do, Your Honor.

1 THE COURT: Okay. You know how patents talk. It  
2 doesn't take much to make something non-infringing. We're  
3 talking about design patents here, which is their own  
4 species. So one little curlicue that jogs left instead of  
5 right can get you out of a design patent. You might be  
6 right, I just don't have the record in front of me.

7 MR. NEUNER: Let me make just a couple of points.  
8 I think you can, Your Honor, from the depictions in the  
9 briefs that make that comparison between what the  
10 acknowledged infringing mask looked like and what the Warren  
11 declaration says it looks like now. You can make that  
12 comparison.

13 THE COURT: I suspect that this is all going to  
14 turn on the angle at which these masks are photographed.  
15 All I've got is -- I mean, I've got photographs of masks,  
16 but I've only got them from certain angles and not from  
17 other angles. They're not perfect photographs.

18 If you're right, then they spent a whole bunch of  
19 money redesigning a mask to come up with something that was  
20 identical to what they already have. That sort of doesn't  
21 make sense. At the same time, your sister ordered these  
22 masks and the pictures in the record, they look pretty  
23 similar to me. But, you know, until I can hold these things  
24 in my hand and compare them, I don't think I can do  
25 anything.

1 MR. NEUNER: Yes, Your Honor. They don't have to  
2 be -- again, looking at the *TiVo* case, they don't have to be  
3 identical. The Court can make the judgment as to whether or  
4 not, okay, are there differences; and if there are  
5 differences, are they significant.

6 THE COURT: Sure. I've got to see them to do  
7 that.

8 MR. NEUNER: That's something Your Honor can do.  
9 Frankly, the plaintiff in this case doesn't see any  
10 significant differences between what they were selling. And  
11 if they are selling -- we're not even sure they are selling  
12 because we have not -- we have -- I have asked counsel to  
13 supply samples of what they are allegedly selling now and  
14 obviously ignored. I don't know what that tells you. It's  
15 one of the reasons we don't have a copy --

16 THE COURT: Well, it tells me you need to take  
17 discovery on that, as well. We need a record of what did  
18 they sell, when did they sell it, were they selling the old  
19 mask or were they selling the new mask. And then we need to  
20 adjudicate whether the new mask does or does not infringe  
21 the '250 patent. We would need a record on this stuff. I  
22 can't do a patent case on the fly.

23 MR. NEUNER: Okay.

24 THE COURT: I can't do any cases on the fly, but  
25 especially not patent cases. And design patent cases are

1 so, you know -- they're so much kind of what the eye sees.

2 MR. NEUNER: Right.

3 THE COURT: And I see your colleague stuck two of  
4 the things on your -- right behind you. I see there's two  
5 masks there. Is one the old mask and one the new mask? Is  
6 that the idea?

7 MR. NEUNER: Yes, Your Honor. This is the one --

8 THE COURT: Can I see them? Would you mind  
9 bringing them up? Give them to Chelsea.

10 MR. NEUNER: There they are.

11 THE COURT: So which one is the old one?

12 MR. NEUNER: They're both the same, Your Honor;  
13 although, one was ordered in this reporting period and  
14 delivered to -- actually, she's my daughter.

15 THE COURT: Daughter, I'm sorry. My law clerk  
16 said she was your sister, so you can blame her. I'm going  
17 to throw my law clerk under -- the sound you hear is the bus  
18 rolling over my law clerk.

19 So these look pretty identical to me just  
20 eyeballing them. Maybe Mr. Hansen can -- maybe they admit  
21 this is the old one. I just don't know. At least I can  
22 see -- is this what they actually weigh or are these empty  
23 cans?

24 MR. NEUNER: That's what they weigh.

25 THE COURT: Because they just have air in them.

1 All right. Maybe it would be best if I -- let me  
2 talk to Mr. Hansen first, and then I'll have you back up,  
3 Mr. Neuner, if there's more you want to say. Okay?

4 MR. NEUNER: Yes, Your Honor. Thank you.

5 THE COURT: Mr. Hansen.

6 MR. HANSEN: Good morning, Your Honor.

7 THE COURT: Good morning.

8 So I know you're new to the case and I know the  
9 legal work that got us here wasn't yours, so you don't need  
10 to point that out to me.

11 MR. HANSEN: Thank you, Your Honor.

12 THE COURT: Are you continuing to argue you don't  
13 owe the \$10,000?

14 MR. HANSEN: No, Your Honor.

15 THE COURT: Okay. This just really was not a good  
16 move by your predecessor.

17 MR. HANSEN: Understood, Your Honor.

18 THE COURT: I'm sure you know this, I'm sure  
19 you've informed your clients of this, even if Boost did  
20 commit defamation eight months after I entered my order, you  
21 don't get to defy a court order because you anticipate you  
22 might win a lawsuit in a couple years. I'm happy to hear  
23 you're not defending it. Make sure you put that check, plus  
24 interest, in the mail to them ASAP, okay, so we can at least  
25 take care of through December.

1           So you've looked at the case now. What's  
2           post-December? What's your position as to post-December?

3           MR. HANSEN: Right. So, Your Honor, I think  
4           there's a couple things going on here. You know, really  
5           this motion was brought on the \$10,000 that was due and  
6           owing, and the rest of the motion is premature. Whether the  
7           redesign is an effective redesign, whether there were  
8           additional royalties due, that's not properly before this  
9           Court. They were new arguments and new evidence put in the  
10          reply brief. At the time of the briefing, there were  
11          amounts that were not due and owing. But I want to clear up  
12          for the Court what has happened even with respect to those  
13          two bottles, because those two bottles are identical.

14          So Oxygen Plus was selling the old design through  
15          December 15th of 2018, and then it exclusively was selling  
16          the new mask until April of '18 -- of '19, excuse me. And  
17          then in that time period they started selling the old mask  
18          as well as the new mask, and that would trigger royalty  
19          payments.

20          So here is what Oxygen Plus's position is, is we  
21          certainly owe the \$10 ,000, and I understand that interest  
22          will be added to that. We also made sales in the April  
23          reporting period, which we reported to counsel on April 30  
24          -- or on -- yeah, on April 30th.

25          THE COURT: Okay.

1 MR. HANSEN: And so that amount is \$30,000, and  
2 that is due. And then we also admit that we are selling the  
3 old mask presently through the end of the license period,  
4 which is May 15th. So that triggers another 35,000. So I  
5 have \$75,000 here for plaintiffs. And I understand that  
6 interest ought to be owed to the December time period.

7 THE COURT: Okay. So I'll just have you talk to  
8 -- I assume the two of you can put your heads together what  
9 the interest is. They're asking for the statutory  
10 prejudgment interest rate. That seems fair to me. And you  
11 can supplement that. That's good.

12 And then, okay, go ahead. I'm sorry.

13 MR. HANSEN: With respect to the remaining issue  
14 of the redesign as well as, you know, perhaps their breach  
15 of good faith and fair dealing in the license agreement or  
16 other torts that Oxygen Plus may raise, I think this is  
17 something that, like I say, is not yet ripe, but the parties  
18 would greatly benefit by a settlement conference in this  
19 matter perhaps with some discovery beforehand or some  
20 disclosures beforehand, because the product has been  
21 redesigned.

22 THE COURT: Do you have a redesigned one?

23 MR. HANSEN: Yes, I do, Your Honor. And let me  
24 briefly explain what has happened here. This was the  
25 patented design (indicating). And that looks a lot like the

1 patent that's in the record at ECF entry 1-1. This is the  
2 Boost design.

3 THE COURT: That's the '250 patent? The Boost  
4 design. Okay.

5 MR. HANSEN: This (indicating) is the old Oxygen  
6 Plus design.

7 THE COURT: Okay, the infringing design. Uh-huh.

8 MR. HANSEN: And this (indicating) is the  
9 redesigned Oxygen Plus.

10 THE COURT: Can you hand the redesigned one to  
11 Chelsea. I'd just like to take a look at it.

12 MR. HANSEN: Yes, I can, Your Honor.

13 And one of the things that I'd like to clear up is  
14 that, you know, I was counsel for *Tivo* at the time of *Tivo*  
15 *v. Echostar*, so I'm intimately familiar with that case.

16 THE COURT: Oh, okay. I'm sorry, can you hand me  
17 up -- so this one (indicating) looks identical to this  
18 (indicating). I thought these were the old ones.

19 MR. HANSEN: The change is slight, Your Honor.  
20 The difference is from an angle, and it's a spherical look  
21 on the bottom, as opposed to an angular look. So the old  
22 design has --

23 THE COURT: Oh, I see. On the sides underneath  
24 the lips?

25 MR. HANSEN: Correct. So it's a sphere on the

1 bottom half of the mask; whereas, the old design is more of  
2 an angular look.

3 THE COURT: I see. I do see the difference now.  
4 Yeah. That looks to me like something you're going to argue  
5 about, is what it looks like to me.

6 MR. HANSEN: Well, and what I want to be clear on  
7 is that at least our position is you don't compare the two  
8 products. You compare the patent to the new design.

9 THE COURT: Yeah. That's the way the consent  
10 judgment is written, is the new design can't infringe on the  
11 '250 patent.

12 MR. HANSEN: Right. So, Your Honor, I mean, I  
13 wasn't around for a lot of this, and I know that Oxygen Plus  
14 has admitted infringement and validity of the patent. I  
15 suspect those are issues that would be raised in a new suit  
16 on the new design. But the important thing is there was a  
17 redesign, and the redesign is exactly according to Exhibit B  
18 of the settlement agreement and consent judgment, which was  
19 the allowed redesign. It's the spherical shape.

20 THE COURT: Well, that's not exactly how the  
21 consent judgment is written. I know you've read it. The  
22 consent judgment says that your new product can't infringe  
23 the '250 patent period. That's the commitment. Then  
24 there's this sort of musing about the lines and, you know,  
25 and the prior art and further iterations will draw us even

1 closer to the prior art.

2 MR. HANSEN: Right.

3 THE COURT: So the actual commitment and the  
4 consent judgment is you can't infringe the '250 patent.

5 MR. HANSEN: Yes, Your Honor.

6 THE COURT: I mean, this is exactly why you can't  
7 do patent cases on the fly. I don't even know if I've got a  
8 copy of the '250 patent, but I would have to read it and see  
9 if this infringes or not.

10 Then we have the further complication that your  
11 client stipulated that the patent is valid and they  
12 stipulated that the old design did infringe it.

13 I mean, it looks to me like there's a -- so  
14 lawyers should solve problems, not create problems. This  
15 has the potential of spinning out of control and creating  
16 hundreds, if not more, hundreds of thousands of dollars of  
17 patent lawyer time. And because we're in a contempt  
18 proceeding essentially, your clients could be theoretically  
19 responsible for both sides' lawyers. If there's anything  
20 more expensive than paying one side in a patent case, it's  
21 paying both sides in a patent case.

22 So I think you folks getting together and seeing  
23 if you can settle this is an excellent idea. I don't have  
24 any idea how big these companies are or what kind of revenue  
25 they have, but my guess is these are not companies that want

1 to take on million dollar patent litigation, which is what  
2 you're looking at.

3 So at this point I don't know what to say to you  
4 except you agree you owe the money and you even owe them  
5 more money than I thought. You've paid the money. You're  
6 going to pay the interest as soon as you can. I can only  
7 leave you to your own devices to take discovery. I think  
8 you need to get together.

9 Who is the magistrate judge in this case?

10 MR. HANSEN: Judge Rau, Your Honor.

11 THE COURT: So I don't know how quickly -- he has  
12 been dealing with some health problems. I don't know how  
13 quickly he's going to be able to get you in, but there's no  
14 reason you can't put your heads together without him. And  
15 I'll contact him after the hearing today and see if he can  
16 get you in. But you need to do some combination of  
17 settlement conference and discovery. And, hopefully, you  
18 can find a way to resolve this without us having a brand-new  
19 patent case blossom out of the mist of this. Okay?

20 MR. HANSEN: Understood, Your Honor.

21 THE COURT: Okay. So I know this isn't you, I  
22 know this was your predecessor, but this criminal defamation  
23 stuff is really dumb.

24 MR. HANSEN: Understood.

25 THE COURT: I hope not only understood, but I hope

1 agree.

2 MR. HANSEN: Oh, and I agree.

3 THE COURT: There hasn't been a criminal  
4 defamation case in Minnesota that has been successful in a  
5 century. And, you know, I wrote a list of all the problems  
6 with it. I got to six problems, and I won't go through them  
7 with you. This is just really dumb.

8 So let's focus on getting the thing back on. You  
9 had a settlement. The settlement looked pretty fair. I  
10 imagine there must be a million ways to design a mask that  
11 doesn't infringe the '250 patent; find one. Maybe this is  
12 one. I'm not stating a position. This is something that  
13 you guys should be able to resolve without both sets of  
14 clients pouring tons more money into this case. Okay?

15 MR. HANSEN: Thank you, Your Honor.

16 THE COURT: All right. Thank you, Mr. Hansen.  
17 I'm glad you're onboard.

18 Mr. Neuner, is there anything more you want to say  
19 at this point?

20 MR. NEUNER: Just two points, Your Honor, and Your  
21 Honor mentioned it, so I'm not adding anything to the  
22 conversation, unfortunately. But the consent judgment does  
23 say that here's a design that you begin with and then you  
24 change it to get closer to the prior art and away from --

25 THE COURT: Yeah. I didn't read the consent

1 judgment to say that if you design something that meets this  
2 drawing, it will not infringe the '250 patent.

3 The commitment there is the new design won't  
4 infringe the '250 patent. It refers to this design. It  
5 kind of says -- I can't remember the exact language -- we'll  
6 do something along these lines and we'll continue to get it  
7 closer to the prior art. But that thing, it's one side-view  
8 of a -- you couldn't design a mask based on that drawing  
9 anyway.

10 MR. NEUNER: You're right, Your Honor.

11 THE COURT: I agree. Ultimately the question will  
12 be whether this infringes the '250 design patent.

13 Have you seen this (indicating), this new mask?

14 MR. NEUNER: I have not, Your Honor.

15 THE COURT: Well, you'll have a chance to see it,  
16 compare it to your patent. Apparently, the difference they  
17 are going to argue is the under-the-lip slopes. I don't  
18 take a position on that at all.

19 MR. NEUNER: And you're right in terms of  
20 certainly my client wants to avoid the expenditure of  
21 attorney's fees as, obviously, the defendant does, but in  
22 many respects, time is of the essence for my client. It's a  
23 situation where they compete in the marketplace. People see  
24 the two designs. One design is selling for a lower price  
25 than the other. What are they going to buy when they look

1 at two canisters and both are the same? If we can -- and I  
2 see where we're going with this -- and if we do schedule a  
3 settlement conference, I'd like the opportunity if we  
4 could -- and I know your schedule is very, very tight -- get  
5 an early trial date. If we're going to have to retry this  
6 case, that's fine. But, as I say, for my client time is  
7 important.

8 THE COURT: I get it, but an early trial date in  
9 patent cases is really hard to do. You're going to have to  
10 take discovery. We may have to have a *Markman*. I don't  
11 think I've ever had a *Markman* in a design patent case.

12 MR. NEUNER: I don't know why you'd have to. It  
13 is what it is.

14 THE COURT: And right now, as I sit here today, I  
15 am, like most of the judges of this court, already scheduled  
16 four months out. So even if I gave you the next date I have  
17 available, you'd still be three or four months out for this.

18 This is something where really reasonable lawyers  
19 should be able to get together. You had a settlement. It  
20 was on track. There was some unfortunate lawyering on  
21 behalf of Oxygen Plus. I mean, emailing you a copy of the  
22 criminal defamation statute is just stupid, and that got  
23 things off track. You told the prior lawyer that this is  
24 irrelevant. The advice you gave him was right. I wish he  
25 had taken your advice at the time. But Mr. Hansen is in the

1 case now. I'd ask you to work with him and see if you can  
2 get this thing back on track before people spend a ton of  
3 money they don't need to spend.

4 MR. NEUNER: Yes, Your Honor. And I thank you  
5 very much.

6 THE COURT: So I think what I'm going to do is  
7 just deny the motion as moot, given that they've paid you  
8 the 75 and committed to paying you the interest, because I  
9 don't know what I would say at this point.

10 I'm going to call Judge Rau. I'm going to ask him  
11 to get you in as soon as he can. I don't know when that  
12 will be. In the meantime, I would certainly urge the two  
13 attorneys to talk and see how much you can get resolved and  
14 see if you can get this back on track. Okay? So that's the  
15 way we'll proceed.

16 Thank you for your help with the case.

17 MR. NEUNER: Thank you very much, Your Honor.

18 THE LAW CLERK: All rise.

19 (Court adjourned at 8:56 a.m.)

20 \* \* \*

21 I, Debra Beauvais, certify that the foregoing is a  
22 correct transcript from the record of proceedings in the  
23 above-entitled matter.

24 Certified by: s/Debra Beauvais  
25 Debra Beauvais, RPR-CRR